a safe working place only in those cases where a definite interval, within which inspection should have been made, has elapsed from the time of the creation of the danger to the time of the injury, the length of this interval to be determined by what is reasonable from the nature of the work. For example, as a usual thing workmen using scaffolding cannot recover against the master for injury due to faulty construction. *O'Connor* v. *Neal*, 153 Mass. 281. But there comes a time beyond which a master must inspect and himself assume the responsibility for such construction. *Benzing* v. *Steinway*, 101 N. Y. 547; see also *Gulf, etc., R. R. Co.* v. *Redeker*, 67 Tex. 181, and *Lovegrove* v. *London R. R.*, 16 C. B. N. S. 668. These cases, like others, are indeed often explained by well known rules applicable only to the special subject matter. But these rules, even when helpful, are clumsy in justice, and rather rules of thumb than principles of law. The test suggested, however, has an application to the whole subject, and offers an explanation for many otherwise incomprehensible cases. *Cf. Mather* v. *Rillston*, 156 U. S. 391; and *New England R. R.* v. *Conroy*, 175 U. S. 323. The principal case is an illustration of its application.

RECENT CASES.

AGENCY — AGENT'S RIGHT TO INDEMNITY — PRINCIPAL NOT AT FAULT. — The plaintiff, a Paris auctioneer, at the request of the defendant in England advertised the latter's mare "Pentecost" for sale. A third person claiming to own the true mare "Pentecost" recovered damages in France from the plaintiff for so advertising. In the present action, brought to secure indemnity for expenses incurred as a result of the French action, it appeared that the defendant's mare was the true "Pentecost." *Held*, that the defendant company is not liable, since it was not at fault. *Halbronn* v. *International Horse Agency, etc.*, [1903] 1 K. B. 270.

The court cites no authority for its position, and none has been found. It seems to have been heretofore considered established that a principal must indemnify his agent for all expenses incurred because of the agency. *Frixione* v. *Tagliaferro*, 10 Moo. P. C. 175; *McArthur* v. *Campbell*, 2 Ad. & E. 57. This is true even though the agency may have terminated at the time the expense was incurred, and even though the expense was unjustly forced upon the agent by the act of a third party. *D'Arcy* v. *Lyle*, 5 Binn. 441. This liability does not seem to depend on any wrongful act of the principal, but is rather an incident to the mere relation of principal and agent. *Stocking* v. *Sage*, 1 Conn. 518. For these reasons the doctrine of the principal case seems difficult to support.

AGENCY — ATTORNEY AND CLIENT — CONTRACT FOR EXCESSIVE FEE. — *Held*, that an attorney's contract with his client for a fifty per cent contingent fee is not necessarily unenforceable on the ground of being unconscionable. *Matter of Mary Fitzsimons*, 174 N. Y. 15.

By the terms of an agreement between an attorney and his client, who was the plaintiff in an action for personal injuries, the attorney was to have fifty per cent of any amount recovered, and the client was to bear all expenses. *Held*, that this agreement is unconscionable, and therefore not enforceable. *Herman* v. *St. Ry. Co.*, 48 Oh. L. Bul. 238 (U. S. Circ. Ct., Second Circ.).

The cases were decided independently of any doctrine of champerty. An agreement which an attorney has secured from his client by taking improper advantage of his fiduciary relation will not be enforced. *Gardener* v. *Ennor*, 35 Beav. 549. But it would seem that a contract which establishes the relation should be governed by different principles. *Dockery* v. *McLellan*, 93 Wis. 381; see *Stout* v. *Smith*, 98 N. Y. 25. Since an attorney is entirely free to refuse a retainer, it is difficult, where no question of champerty is involved, to discover any principle by which his right to impose conditions on acceptance should be abridged. *Dockery* v. *McLellan*, *supra*. No decision supporting

the federal case has been found. Some courts, however, in sustaining the agreements before them, have failed to distinguish between contracts made before and after the fiduciary relation exists, and have apparently assumed that both would be unenforceable if the compensation were excessive. See *Ex parte Plitt*, Fed. Cas. No. 11,228; *Fellows* v. *Smith*, 190 Pa. St. 361. Other courts have sustained contracts for a fifty per cent contingent fee without indicating their exact attitude toward the question under discussion. *Taylor* v. *Bemis*, 110 U. S. 42; *Topeka, etc., Co.* v. *Root*, 56 Kan. 87.

AGENCY — MASTER AND SERVANT — DUTY TO PROVIDE SAFE PLACE. — During the progress of an excavation under the supervision of a foreman, employees undermined and rendered dangerous a large mass of lime. The plaintiff's decedent, sent to work thereunder, was killed. He had been employed subsequently to the undermining of the lime. Sufficient time had elapsed since the creation of the danger for the master to discover it by reasonable inspection. *Held*, that the plaintiff can recover. *Simone* v. *Kirk*, 173 N. Y. 7. See NOTES, p. 593.

BANKRUPTCY — DEBTS NOT DISCHARGED — OMISSION FROM SCHEDULE. — Under § 17 (3) of the Bankruptcy Act all provable debts are discharged "except such as . . . have not been duly scheduled in time for proof . . . unless such creditor had actual . . . knowledge of the proceedings in bankruptcy." The defendant, a bankrupt, knowing that he was liable to the plaintiff on a note, failed to schedule it in the plaintiff's name. The latter had no knowledge of the bankruptcy proceedings until seven months after the adjudication and two months after the discharge. *Held*, that the discharge does not bar the plaintiff's action on the note. Vann, J., dissented. *Columbia Bank* v. *Birkett*, 174 N. Y. 112.

The court argues that since the present Bankruptcy Act, departing from all previous acts, gives great importance to schedules, an intention is thereby indicated that the creditor should have such knowledge as would enable him to participate in the proceedings. Vann, J., dissenting, maintains that the creditor is barred if he has knowledge in time to prove his claim; that, since under § 57 the plaintiff still had five months, his debt was discharged. The latter interpretation derives some support from the wording of § 17. It accords, also, with the only similar case. *Fider* v. *Mannheim*, 78 Minn. 309. This view, however, would deprive creditors of many valuable rights given in other parts of the act, such as the right to examine the bankrupt and oppose his discharge, and might even enable a designing debtor whose estate was quickly settled to defeat the creditor's claim entirely. See § 65. The majority unfortunately mention no definite day before which knowledge must be acquired to be material. Yet, considering the whole act, their opinion appears the better.

BANKRUPTCY — PRIORITY — CLAIMS FOR WAGES. — The federal Bankruptcy Act, § 64 *b*, gives priority to claims for wages earned within three months before the commencement of bankruptcy proceedings, not to exceed three hundred dollars in amount; and further, to all debts entitled to priority under the laws of the state. Certain claims for wages not earned within three months of the commencement of the proceedings, were entitled to priority under the New York laws. *Held*, that they are not entitled to priority under the federal act. *In the Matter of Slomka*, 29 N. Y. L. J. 294 (C. C. A., Second Circ.), reversing *In Re Slomka*, 117 Fed. Rep. 688.

For a discussion of the question involved, see 16 HARV. L. REV. 138.

BILLS AND NOTES — ALTERATIONS BY THE PAYEE — IMPLIED CONSENT. — The payee of a note in good faith changed the rate of interest from eight per cent, as printed, to seven and one half per cent, the rate really agreed upon by the parties. *Held*, that the payee may recover on the note. *Osborn* v. *Hall*, 66 N. E. Rep. 457 (Ind., Sup. Ct.).

In general at common law a material alteration of a negotiable instrument renders it void. *Master* v. *Miller*, 4 T. R. 320. Alteration of the rate of interest is material. *Draper* v. *Wood*, 112 Mass. 315. This is true although the alteration benefits the party charged. *Coburn* v. *Webb*, 56 Ind. 100. When an instrument fails to express the real agreement of the parties, some courts hold that it can be reformed only by actual consent or by a court of equity. *Evans* v. *Foreman*, 60 Mo. 449. But by the weight of authority, alteration to express the real agreement does not render the instrument void, since the assent of the parties may be implied. *Ames* v. *Colburn*, 11 Gray (Mass.) 390. Technically this doctrine can hardly be defended, but the practical reasons for supporting it are obvious and probably decisive. Thus under such circumstances it seems unfair that a holder in due course should have no recovery. This would be the necessary consequence of holding the instrument void. *Outhwaite* v.

Luntley, 4 Camp. 180. The Negotiable Instruments Law, § 124, meets this difficulty by providing that a holder in due course, not a party to the alteration, may enforce payment according to the original tenor of the instrument.

BILLS AND NOTES — CHECK — PAYEE AS A HOLDER IN DUE COURSE. — The Massachusetts Negotiable Instruments Law provides that a holder in due course of negotiable paper is one who takes it before maturity, in good faith and for value, with no knowledge of any infirmities in the title of the person negotiating it; and also that a pre-existing debt constitutes value. The drawer of a check gave it to a third person to be delivered to the payee in payment of a debt owed him by the drawer. The third person fraudulently delivered the check as payment of a debt which he himself owed to the payee, the latter accepting it as such payment in good faith. *Held*, that the payee is a holder in due course. *Boston Steel & Iron Co.* v. *Steuer*, 66 N. E. Rep. 646 (Mass.).

The definition of a holder in due course contained in the Negotiable Instruments Law, adopted by Massachusetts, was taken from the English Bills of Exchange Act. In a widely circulated *dictum* Lord Russell gave it as his opinion that under the latter act a payee could not be a holder in due course. See *Lewis* v. *Clay*, 67 L. J. Q. B. 224. There appears to be no decision on the point, but this *dictum* was later disapproved in *Herdman* v. *Wheeler*, [1902] 1 K. B. 361. The interpretation of the statute in the principal case is in accord with the common law doctrine. *Watson* v. *Russell*, 3 B. & S. 34; *Fairbanks* v. *Snow*, 145 Mass. 153; *contra*, *Camp* v. *Sturdevant*, 16 Neb. 693. The best explanation of the situation seems to be that whoever is in possession of a negotiable instrument has the legal right to enforce payment if he is within the tenor of the promise. See *Collins* v. *Martin*, 1 B. & P. 648. Under this view, the manner of getting possession is material only to decide whether or not the holder has this right free from equitable defenses. In the principal case the payee gave value without notice of infirmities. Therefore he took free of equities and should be allowed to enforce payment as a holder in due course.

CONFLICT OF LAWS — DIVORCE — BINDING EFFECT OF FOREIGN DECREE UPON PARTY OBTAINING IT. — The plaintiff and her husband were domiciled in New York. The plaintiff went to Massachusetts, acquired a *bona fide* domicile there, and obtained a divorce. The husband in New York was served with personal summons, but did not appear in the suit. Upon the husband's death the plaintiff brought an action in New York for dower in his lands situated in that state. *Held*, that the plaintiff cannot question the Massachusetts decree. *Starbuck* v. *Starbuck*, 173 N. Y. 503.

The court considers the Massachusetts decree not binding in New York, but justifies its decision on the ground that a plaintiff who has invoked the jurisdiction of a foreign court cannot later question the validity of its decree for lack of jurisdiction. This is well recognized where the elements of equitable estoppel are present, as where alimony has been accepted. *Ellis* v. *White*, 61 Ia. 644. In the absence of estoppel there seems to be little authority outside of New York in support of the court's proposition. The cases cited to sustain it either involve equitable estoppel or rely on cases which involve it. *Daniels* v. *Tearney*, 102 U. S. 415; *Arthur* v. *Israel*, 15 Col. 147. On principle, also, the position seems doubtful. Recovery is denied in a case where, on the court's assumption that the decree is ineffective, no legal defense exists, and where the defendant seems not to have been so injured by the plaintiff's conduct as to be entitled to an injunction restraining her from enforcing her legal rights. The result of the case may well be supported, however, on the ground that the Massachusetts decree was binding on the New York court. See *Atherton* v. *Atherton*, 181 U. S. 155; 15 HARV. L. REV. 66.

CONFLICT OF LAWS — ENFORCEMENT OF FOREIGN OBLIGATION — OBLIGATION IN EFFECT PENAL. — An Illinois corporation sold goods to X while he and his wife, citizens of Massachusetts, were temporarily in Illinois. By a statute of Illinois both husband and wife, or either of them, are made liable for family expenses. The corporation sued the wife in Massachusetts. *Held*, that the action cannot be maintained. *Mandell Brothers* v. *Fogg*, 66 N. E. Rep. 198 (Mass.).

Among the exceptions to the rule that foreign-created rights will be enforced is the rule that a state will not enforce penal obligations created in another. If the obligation is more than mere compensation for injury done the plaintiff, generally speaking, it will not be enforced in another state. Thus a foreign obligation to support a bastard child will not be enforced. *Graham* v. *Monsergh*, 22 Vt. 543. Nor an obligation to support a son-in-law. *De Brimont* v. *Penniman*, 10 Blatch. (U. S. Cir. Ct.) 436. It would seem that the principal case should fall within the exception. The law of community of

goods does not exist in Illinois; nor is the statute, under which the claim in the principal case is made, a community statute. It makes a charge not on common property but on separate property. Since the husband is by law liable for the debts of the family in any event, this statute, which puts a new burden on the wife in the interest of the husband's creditors, is in the nature of a penalty.

CONSTITUTIONAL LAW — EMINENT DOMAIN — WHAT CONSTITUTES A "TAKING." — A dam was erected under the authority of Congress for the improvement of a harbor. Land of the plaintiff, an upper riparian owner, was permanently flooded by the higher level of the river, preventing drainage from the land. The plaintiff sued the United States. *Held*, that he can recover. *United States* v. *Lynch*, 23 Sup. Ct. Rep. 349.

Property cannot be taken without compensation, although the act be done under the power of Congress to regulate commerce. *Monongahela Nav. Co.* v. *U. S.*, 148 U. S. 312. *Cf. Peart* v. *Meeker*, 45 La. Ann. 421. The federal courts under the Fifth Amendment are not bound by state decisions as to what is a "taking" of property. See 14 HARV. L. REV. 457. But no definite federal rule has been laid down. The Supreme Court seems to recognize that a physical taking of property is not essential. See *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166. Recovery for certain "incidental" damage, however, as where navigable access to the plaintiff's land was destroyed, has been refused. *Scranton* v. *Wheeler*, 179 U. S. 141. The three dissenting judges thought the damage in the principal case incidental. Physical damage to the land, however, did exist. The flooding, moreover, was as proximately caused as if water had been directly flowed upon the land, and under the latter circumstances the court would have allowed recovery. See *Pumpelly* v. *Green Bay Co.*, *supra*. The decision accordingly seems correct.

CONSTITUTIONAL LAW — INTERSTATE COMMERCE — TERMINI OF ROUTE WITHIN STATE. — The plaintiff, a railroad connecting two points in Arkansas, ran for a distance in Indian Territory. The defendants, railroad commissioners of Arkansas, attempted to fix the rates for the haul, and the plaintiff sought to enjoin their action. *Held*, that the carriage between the two points is interstate commerce and the injunction will be granted. *Hanley et al.* v. *Kansas City Southern Ry. Co.*, 23 Sup. Ct. Rep. 214.

The point presented in the principal case is here for the first time decided by the Supreme Court. It has, however, arisen several times in state courts, the decisions being about equally divided. *Accord*, *Sternberger* v. *Cape Fear & Y. V. R. R. Co*, 29 S. C. 510; *contra*, *State* v. *Western Union Tel. Co.*, 113 N. C. 213. The state decisions opposed to the principal case follow a *dictum* of the Supreme Court, which considered the commerce domestic in sustaining, under a similar set of facts, a tax upon receipts proportionate to the mileage within the state. *Lehigh Valley R. R.* v. *Penn.*, 145 U. S. 192. Such a tax, however, has been held constitutional as a franchise tax, even where the commerce was admittedly interstate. *Maine* v. *Grand Trunk Ry.*, 142 U. S. 217. Moreover, a vessel which on a voyage between two ports of the same state passed more than a marine league from shore was held to be engaged in interstate commerce. *Pac. Coast S. S. Co.* v. *R. R. Commissioners*, 18 Fed. Rep. 10. The principal case, then, in making material the route as well as the destination adopts the usual liberal construction of the interstate commerce clause. See *The Daniel Ball*, 10 Wall. (U. S. Sup. Ct.) 557. Since, if this commerce is not interstate, there would be no power to prevent interference by the neighboring state, the result seems desirable upon practical grounds.

CONSTITUTIONAL LAW — MUNICIPAL HOME RULE — STATE ASSESSMENT OF FRANCHISES. — The Constitution of New York directs that all municipal officers whose selection is not otherwise provided for shall be chosen by the electors of the municipality. N. Y. Const., Art. 10, § 2. A New York statute, Laws of 1899, c. 712, provides that a state board shall assess franchises to operate in streets, highways, and public places, together with the tangible property therein. *Held*, that the statute is constitutional. *People, ex rel. Metropolitan Street Ry. Co.* v. *Tax Commissioners*, 174 N. Y. —, (decided April 28, 1903). See NOTES, p. 592.

CONSTITUTIONAL LAW — MUNICIPAL OWNERSHIP — FUEL PLANTS. — In reply to questions submitted by the legislature, the Supreme Court of Massachusetts delivered an advisory opinion that proposed legislation authorizing cities and towns to establish and operate fuel yards would be constitutional only when limited to meeting an emergency in which government agencies alone could procure fuel. *In re Municipal Fuel Plants*, 66 N. E. Rep. 25 (Mass.). See NOTES, p. 584.

CONTRACTS — ACCORD AND SATISFACTION — PAYMENT OF LIQUIDATED DEBT BY NOTE FOR SMALLER AMOUNT. — A recovered judgment against B for two hundred and twenty-six dollars. Nothing was obtained on the execution issued. A thereupon accepted fifty dollars in cash and B's unsecured note for fifty dollars, agreeing that the debt should be fully discharged if the note were paid at maturity. B paid the note at maturity and A gave a receipt in full. *Held*, that the judgment debt has not been discharged. *Shanley* v. *Koehler*, 80 App. Div. 566.

Apart from statute a smaller sum accepted in full payment of a liquidated debt does not discharge the debt, since there is no consideration for the surrender of the balance. *Foakes* v. *Beer*, L. R. 9 App. Cas. 605; *Weber* v. *Couch*, 134 Mass. 26. *Contra*, *Clayton* v. *Clark*, 74 Miss. 499. The decision in the principal case is based on this rule, for it is difficult to consider the payment of the note at maturity more valuable than the immediate payment of the same amount. But it has been generally recognized that a present payment may in fact be of more value than a mere claim for a larger sum. See *Foakes* v. *Beer*, L. R. 9 App. Cas. 605, 617, 622; 12 HARV. L. REV. 525, n. 1. The general rule has consequently been greatly limited by technical distinctions. Thus the debtor's payment of a part of the debt and of the costs of a prior action for its enforcement has been held sufficient, although the total sum paid was less than the debt. *Mitchell* v. *Wheaton*, 46 Conn. 315. Similarly many courts hold that the debtor's unsecured paper for a smaller amount may constitute a discharge if honored at maturity. *Sibree* v. *Tripp*, 15 M & W. 23; *Wells* v. *Morrison*, 91 Ind. 51. *Contra*, *Siddall* v. *Clark*, 89 Cal. 321. In the principal case, therefore, it would seem that the court might have reached an opposite and more desirable conclusion.

CONTRACTS — ANTICIPATORY BREACH — INSURANCE CONTRACT. — The plaintiff was insured for $5000 by the defendant corporation. The defendant decided to limit the amount payable upon existing certificates to $2000. Accordingly, it refused to recognize the plaintiff's original contract or to accept premiums under it. The plaintiff sued the defendant for breach of contract. *Held*, that, since the defendant was by the terms of its contract called upon to pay only on the death of the plaintiff, there was no breach. *Langan* v. *Supreme Council, Am. Legion of Honor*, 174 N. Y. 266.

It has been thought that New York had virtually adopted the anticipatory breach doctrine. See 14 HARV. L. REV. 433, n. 4. The doctrine, however, has never been necessarily recognized, though there are numerous *dicta* to that effect. The one case of a marriage contract is to be distinguished on the ground that there was a breach of an actual implied promise to act consistently with the marriage contract. *Burtis* v. *Thompson*, 42 N. Y. 246. On the other hand, it has been said that an action will not lie at once when the maker of a promissory note declares before its maturity that he will not honor it. See *Benecke* v. *Haebler*, 38 N. Y. App. Div. 344. On principle this would seem to be an anticipatory breach, though the doctrine would probably nowhere be applied to such a case. The contract of insurance, being merely to pay money in the future, might be thought analogous to the case of a promissory note. But if not within that exception, the principal case clearly presents an anticipatory breach, and is therefore inconsistent with the existence of that doctrine in New York.

CONTRACTS — CONSTRUCTION — PRESUMPTION AS TO PLACE OF PERFORMANCE. — The defendant contracted in Kentucky to employ the plaintiff for two years as superintendent of his factory, the written agreement not stating the place of performance. Before the expiration of two years, the factory was moved from Kentucky to Indiana. The plaintiff refused to superintend the business there, and, upon the defendant's refusal to pay his salary, brought an action for breach of contract. *Held*, that there is a *prima facie* presumption that the contract is to be performed in the state in which it is made. *Cook* v. *Todd*, 72 S. W. Rep. 779 (Ky.).

The doctrine that such a presumption exists seems to have originated with those courts which hold that a contract must be construed according to the law of the jurisdiction in which it is to be performed. *De Sobry* v. *De Laistre*, 2 H. & J. (Md.) 191. To determine the place of performance when the contract itself contains no expression of intention, this presumption was introduced. Since the presumption is not calculated to give effect to the intention of the parties, the difficulty might have been met more satisfactorily by holding directly that a contract silent as to the place of its performance will be construed according to the law of the jurisdiction in which it was made. See *Mittenthal* v. *Mascagni*, 66 N. E. Rep. 425 (Mass.). The use of this presumption, as in the principal case, not to decide a question of jurisdiction, but to determine the substantive rights of the parties, seems peculiarly unfortunate. If the terms of a written contract when interpreted by the aid of such evidence as is properly admissible do not indicate the intention of the parties as to the place of performance, there seems to be no reason for narrowing the scope of those terms by an arbitrary presumption.

CONTRACTS — ILLEGAL CONTRACTS — OUSTING COURT OF JURISDICTION. — A contract was made in Italy by the defendant, who was an Italian citizen, and the plaintiff, an American who elected in the contract to have an Italian domicile. To an action on the contract brought in Massachusetts the defendant pleaded in abatement an express stipulation that the contract was to be sued on only in Florence, Italy. *Held*, that since this stipulation is neither unreasonable nor against public policy it is a good plea. *Mittenthal* v. *Mascagni*, 66 N. E. Rep. 425 (Mass.).

The decision is in accord with the only authorities which have been found. *Gienar* v. *Meyer*, 2 H. Bl. 603; *Johnson* v. *Machielsne*, 3 Camp. 44. These cases go on the ground that parties may contract to waive the right to appeal to the courts in one jurisdiction if they retain the right to sue in another, provided the contract is reasonable. The same principle appears in those cases which allow an insurance company to limit suit on a policy to one state or county. *Daley* v. *People's Building Association*, 178 Mass. 13; *Greve* v. *Aetna Live Stock Ins. Co.*, 81 Hun (N. Y.) 28. Similarly parties may by express agreement bar an action within a period shorter than the statute of limitations. *Ameshury* v. *Bowditch Mut. Fire Ins. Co.*, 6 Gray (Mass.) 596; *Matter of Petition of N. Y., etc., R. R. Co.*, 98 N. Y. 447. The doctrine of the principal case seems, however, somewhat opposed to the underlying principle of the well established rule that an agreement to arbitrate can be enforced only when in the form of a condition precedent to liability on the contract. *Scott* v. *Avery*, 5 H. L. Cas. 811. Since it carries out the intention of the parties and encourages freedom of contract, the doctrine of the principal case seems to be the desirable one.

CONTRACTS — INTERPRETATION — CHANGE OF RULES OF SOCIAL CLUB. — The constitution of a social club contained no provision for its amendment, but had been frequently amended by majority vote before the plaintiff joined the club. An amendment raising the annual dues having been adopted without the plaintiff's consent, he refused to pay the additional amount, and sought an injunction against interference with his enjoyment of the club's privileges. *Held*, that the injunction will be granted. *Harington* v. *Sendall*, 19 T. L. R. 302 (Eng., Ch. D.).

A club is analogous to a partnership in that both the constitution of the one and the articles of agreement of the other are obligatory only as contracts. See *Austin* v. *Searing*, 16 N. Y. 112, 121. In partnership cases it is held within the implied terms of the contract that with regard to acts within the ordinary scope of the business the majority shall prevail. *Peacocks* v. *Chambers*, 46 Pa. St. 434. But unanimity is essential to the validity of acts repugnant to, or in alteration of, the contract of partnership. *Appeal of Jennings*, 16 Atl. Rep. 19 (Pa.). Apart from special circumstances, the same principles would seem to be decisive of the principal case. If, however, the plaintiff had known of the usage of the club to abide by the will of the majority in all cases, that usage would impliedly have been part of the contract of membership. See *Loring* v. *Gurney*, 5 Pick. (Mass.) 15; 2 GREENL. EV. 16th ed. § 251. But it is well settled that a party to a contract is not bound by a particular usage of which he had no knowledge at the time of contracting. *Gabay* v. *Lloyd*, 3 B. & C. 793. Accordingly, the decision in the principal case appears sound.

CORPORATIONS — STOCKHOLDER'S RIGHT TO VOTE — INTEREST OF DIRECTOR. — Directors were privately interested in a loan to the corporation. The required vote of two-thirds of the stockholders in accepting the loan could not have been attained without the votes cast by the interested directors. *Held*, that the transaction will not be set aside at the suit of a minority shareholder. *Hodge* v. *U. S. Steel Corp.*, 54 Atl. Rep. 1 (N. J., C. A.). See NOTES, p. 585.

DAMAGES — PROVOCATION IN MITIGATION OF COMPENSATORY DAMAGES. — The defendant assaulted the plaintiff because of the publication by the latter of an article concerning the defendant. *Held*, that evidence of the provocation may be considered in mitigation of the damages actually suffered by the plaintiff. *Genung* v. *Baldwin*, 77 N. Y. App. Div. 584. See NOTES, p. 591.

DAMAGES — TROVER — SEVERANCE OF COAL FROM THE REALTY. — The defendant by a non-negligent mistake mined coal in the plaintiff's land. The plaintiff brought trover. *Held*, that the measure of damages is the value of the coal immediately after severance. *Ivy Coal & Coke Co.* v. *Alabama Coal & Coke Co.*, 33 So. Rep. 547 (Ala.). See NOTES, p. 589.

EQUITY — INJUNCTION — PATENT PUT TO ILLEGAL USE. — The plaintiff sought to enjoin the defendant from infringement of his patent on detectors of bogus coins. The defendants established that the plaintiff used these detectors exclusively to guard

gambling-machines. *Held*, that plaintiff is entitled to an injunction. *Fuller* v. *Berger*, 120 Fed. Rep. 274 (C. C. A., Seventh Circ.).

This case was discussed before its appearance in the regular reports at p. 444 *ante*.

EQUITY — PROTECTION OF CONTRACT RIGHTS — INJUNCTION AGAINST STRIKERS. — A coal agency, having large contracts both for the purchase of coal from mine owners and for its delivery to customers, filed a bill to restrain the continuance of a strike in the mines, in which the strikers, by intimidation, were unlawfully preventing others from working. The defendants demurred. *Held*, that the injunction will be granted. *Chesapeake, etc., Co.* v. *Fire Creek, etc., Co.*, 119 Fed. Rep. 942 (Circ. Ct., W. Va.).

If the interference with the plaintiff's contract, or, in the United States, with his "business expectancies" had been malicious, though otherwise lawful, it would have given rise to an action at law or an injunction in equity. *Lumley* v. *Gye*, 2 E. & B. 216; *Plant* v. *Woods*, 176 Mass. 492. Where the act which is the legal cause of the plaintiff's injury is tortious *per se* — as here — the necessity of malice to connect the defendant's act with the injury is done away with. Thus, had this action been at law the plaintiff would undoubtedly have recovered. *Bowen* v. *Hall*, L. R. 6 Q. B. D. 333. Logically, therefore, as irreparable injury was alleged, an injunction should lie. The case, which is one of first impression on this exact point, is undoubtedly sound, not as an extension, but as a novel application, of recognized legal and equitable principles.

INSURANCE — ACCIDENT INSURANCE — RIGHT OF INSURER TO SUBROGATION. — In an action against an accident insurance company to recover agreed compensation for time lost by the insured because of an injury sustained through the negligence of a railroad, the defendant sets up that the plaintiff had released the railroad from liability. *Held*, that the defendant had no right of subrogation and so was not prejudiced by the release. *Aetna Life Ins. Co.* v. *Parker & Co.*, 72 S. W. Rep. 168 (Tex., Sup. Ct.).

In fire insurance, the insurer is subrogated, on payment of a loss, to the insured's right of action against a tort feasor who may have caused the fire. *Mason* v. *Sainsbury*, 3 Doug. 61. In life and accident insurance, however, there can be no subrogation if, as is commonly said, the contract is not for indemnity as in fire insurance, but simply to pay a fixed sum on the happening of a certain event. See *Phœnix Mut. Life Ins. Co.* v. *Bailey*, 13 Wall. (U. S. Sup. Ct.) 616. But in fact life and accident policies appear to be valued indemnity policies. MAY, INS. 4th ed. § 7. This conception, however, does not necessarily involve the introduction of subrogation, in life insurance at least. For death is the subject of such conjectural pecuniary compensation that in no case can it be said that the insured is more than fully indemnified; consequently subrogation has no place. See *Burnand* v. *Rodocanachi*, L. R. 7 App. Cas. 333; *contra*, *The St. Johns*, 101 Fed. Rep. 469. Accident insurance would be a more likely field for the application of subrogation, particularly in cases like the one under consideration, where the injury can be measured with comparative ease. But the so-called wager view of life and accident insurance is so firmly fixed that subrogation will probably be denied here too. There is no precise authority on the point. But two cases have been found holding that in an action by the insured for his own benefit the tort feasor cannot plead the payment of the insurance in mitigation of damages. *Bradburn* v. *Great Western R. R. Co.*, L. R. 10 Ex. 1; *Harding* v. *Town of Townshend*, 43 Vt. 536.

INSURANCE — RESCISSION OF CONTRACT — PLACING INSURER IN STATU QUO. — The plaintiff took out a life insurance policy in a mutual benefit association for five thousand dollars. Some years later the association repudiated the contract in part by passing a by-law making two thousand dollars the maximum amount payable on any policy. *Held*, that the plaintiff may rescind the contract and recover in full the amount of the assessments paid. *Black* v. *Sup. Council, Am. Legion of Honor*, 120 Fed. Rep. 580 (Circ. Ct., E. D. Pa.).

As conceded in the principal case, the right of rescission depends upon the ability to place the defendant in *statu quo*. *Gassett* v. *Glazier*, 165 Mass. 473. The court held this requirement satisfied on the ground that the insurer had suffered no material detriment, the insured being still alive. This view is supported by the weight of authority. *Van Werden* v. *Equitable Life Assur. Co.*, 99 Ia. 621; *Am. Life Ins. Co.* v. *McAden*, 109 Pa. St. 399. According to the better view, however, rescission is not allowed, since the consideration for the assessments is the risk assumed by the insurer. *Cont. Life Ins. Co.* v. *Houser*, 111 Ind. 266; *Phœnix Mut. Life Ins. Co.* v. *Baker*, 85 Ill. 410. In the case of fire insurance it is universally recognized that the consideration is the risk.

Am. Ins. Co. v. *Garrett*, 71 Ia. 243. It is submitted that the certainty of a future loss, which is the only distinguishing characteristic of life insurance, does not destroy the value of the past assumption of risk. It would seem, therefore, that, if the defendant is deprived of remuneration for such risk, he is not left in *statu quo*. Furthermore rescission is not necessary to protect the plaintiff. The federal courts accept the doctrine of anticipatory breach. *Roehm* v. *Horst*, 178 U. S. 1. Hence the plaintiff could maintain an action for his actual damage. *Union Cent. Life Ins. Co.* v. *Poettker*, 5 Big. Ins. Rep. (Oh.) 449. See *Phœnix Mut. Life Ins. Co.* v. *Baker*, *supra*; *cf. Langan* v. *Supreme Council, etc.*, *supra*, p. 598.

INTERNATIONAL LAW — STATUS OF CUBA DURING UNITED STATES MILITARY OCCUPATION. — A murder was committed on a vessel sailing under a registry issued at Havana by the American military government. *Held*, that the United States courts have no jurisdiction over the offense, since the vessel was an extension of a "foreign country." *United States* v. *Assia*, 118 Fed. Rep. 915 (Circ. Ct., E. D. N. Y.). See NOTES, p. 213.

This case was discussed before it appeared in the regular reports at p. 213 *ante*.

PRACTICE — APPOINTMENT OF AUDITOR IN JURY TRIAL — COSTS. — Because of complexity in the defendant's case the court of its own motion, but with the consent of the parties, appointed an auditor to make a tentative investigation in preparation for trial by the jury. The defendant paid half of the expense. Upon the plaintiff's submitting to a nonsuit, the court refused to allow the defendant to include this amount in his costs. *Held*, that, when the court, in the exercise of its inherent power to secure the attainment of justice in a jury trial, appoints an auditor it may distribute the costs in the most equitable manner. *Fenno* v. *Primrose*, 119 Fed. Rep. 801 (C. C. A., First Circ.).

It is generally held that a court cannot appoint an auditor without the consent of the parties, if he is to decide finally issues of fact. See Note, 79 Am. Dec. 207. *Contra*, *Davis* v. *St. Louis, etc., Ry. Co.*, 25 Fed. Rep. 786. But when he is merely to hold a tentative examination his appointment would seem to be within the power of the court. Certainly the right of trial by jury is not infringed, the reaching of a just verdict merely being rendered more easy. No case has been found which considers the precise point, but the reasoning of one decision is in support of the principal case. See *Lawrence's Cases*, 6 Ct. of Cl. 79. In exercising its discretion as to the costs, the court would seem to be following established precedents. *Nashua & Lowell R. R. Corp.* v. *Boston & Lowell R. R. Corp.*, 61 Fed. Rep. 237; see *Spalding* v. *Mason*, 161 U. S. 375, 397. Since in the principal case the reference was with the consent of the parties, the court might well have rested the decision on the established ground that, in the absence of statute, the court may let the expense lie where it falls. *New Hampshire Land Co.* v. *Tilton*, 29 Fed. Rep. 764.

PROPERTY — FIXTURES — MORTGAGE OF LAND. — The plaintiff rented a number of theatre seats to the owner of a hippodrome for a specified period, the agreement containing a provision for purchase. The seats, as required by local regulations, were firmly fastened to the floor. Later the hippodrome and fixtures were mortgaged to the defendant, who sold the seats. The plaintiff, thereupon, brought an action of trover. *Held*, that the plaintiff may recover, since he was never divested of his title to the chairs. *Lyon & Co.* v. *London, etc., Bank*, 114 L. T. 477 (Eng., K. B.).

This decision seems opposed to the previous English cases. *Hobson* v. *Gorringe*, [1897] 1 Ch. 182. For a discussion of the principles involved, see 10 HARV. L. REV. 190; 16 *ibid.* 531.

PROPERTY — PERPETUITIES — INFANT EN VENTRE SA MÈRE. — The testatrix devised real property to trustees on trust to pay the income to her daughter Y for life, and after her death on trust for the third and every younger son of Y for his life, with remainder upon trust for his first and other sons successively in tail male. Y's third son, the present plaintiff, was born four months after the death of the testatrix. The plaintiff on reaching his majority took out a summons for a declaration that the estates after his life estate were invalid. *Held*, that the subsequent estates to the plaintiff's sons are well devised. *Re Wilmer*, 47 Sol. Jour. 336 (Eng., Ch. D.).

It is a general rule that an infant *en ventre sa mère* will be regarded as born if it is for his benefit. *Doe d. Clarke* v. *Clarke*, 2 H. Bl. 399. More recently the rule has been extended to cover a case in which considering the infant born would benefit another, and not be detrimental to the infant himself. *In re Burrows*, [1895] 2 Ch. 497. But where the child's interest would be unfavorably affected, the courts have refused to

consider him born. *Blasson* v. *Blasson*, 2 De G. J. & S. 665. If, in the principal case, the infant be considered not born at the death of the testator, the estates after that of the plaintiff are void for remoteness and the Court of Chancery would construe the will to give the plaintiff an estate tail. *Cf. Humberston* v. *Humberston*, 1 P. Wms. 332. This he could convert into an estate in fee by a disentailing assurance. It appears then that it is distinctly to the plaintiff's detriment to hold that he was born at the death of the testator. Though it is generally assumed that within the rule against perpetuities a child *en ventre sa mère* is always considered born, it has never been expressly held where there was detriment to the infant. This case is therefore noteworthy.

RES JUDICATA — SUIT FOR BREACH OF TRUST — RIGHTS OF CESTUI NOT PARTICIPATING. — The plaintiff, one of several *cestuis que trustent*, had been joined as co-defendant in a suit brought by another of the *cestuis que trustent* against the trustees for breach of trust. The plaintiff had not appeared in answer to the summons. Only the rights of those *cestuis* who appeared had been passed upon, and a decree for an accounting to them had been issued. The plaintiff now brought suit against the executors of the last surviving trustee for the same breach of trust. *Held*, that he is not barred by the decree in the former suit. *Earle* v. *Earle*, 173 N. Y. 480.

It is frequently stated that as between parties and their privies a judgment is conclusive as to every matter which might have been litigated in the action. See *Jordan* v. *Van Epps*, 85 N. Y. 436. A more exact statement would seem to be that neither party to an action can decline to meet an issue tendered him by the other and then maintain that it has not become *res judicata*. See *Malloney* v. *Horan*, 49 N. Y. 111; FREEMAN, JUDG. 4th ed. § 249. In the principal case the plaintiff and defendant were in no proper sense adverse parties in the former suit, for no claim of the plaintiff against the defendant was passed on by the court. The rights actually settled in the former suit were those of the *cestuis* who appeared, and the plaintiff does not now seek to disturb the adjudication of those rights. Accordingly the decision would appear to be sound.

RES JUDICATA — SUIT FOR CUSTODY OF INFANT — PRIOR DETERMINATION NOT ON MERITS. — A mother filed a petition against her former husband, alleging generally that he was unfit to control their child, and praying that he might be required to deliver the child to the petitioner. The father pleaded that a former petition of the mother had been dismissed on demurrer. *Held*, that a demurrer to this plea must be sustained. *Pearce* v. *Pearce*, 33 So. Rep. 883 (Ala.).

In the United States it is generally held that a decision adverse to the petitioner in a writ of *habeas corpus* does not prevent him from bringing a new writ on the same facts. *People, ex rel. McIntyre*, 67 How. Pr. (N. Y.) 362; *contra*, *In re Hammil*, 9 S. Dak. 390. The reason usually given is that an order remanding to custody may not be appealed from, and therefore cannot be considered final. *Russell* v. *Commonwealth*, 1 P. & W. (Pa.) 82. But *habeas corpus* proceedings for the custody of an infant are in effect a suit between the claimants of the infant. On this ground it is generally held that in such a case an order remanding to custody is conclusive concerning the facts on which it is based. *Mercein* v. *People*, 25 Wend. (N. Y.) 64. For this reason such an order may be appealed from. See *McConologue's Case*, 107 Mass. 154, 170. By analogy to similar *habeas corpus* cases a decree in divorce proceedings awarding the custody of a child to the mother has been held *res judicata* as to the facts on which it was based. *Du Bois* v. *Johnson*, 96 Ind. 6. In these cases, however, the paramount consideration should be the well-being of the infant. See *Mercein* v. *People*, *supra*. Accordingly the principal case may be defended, for the first dismissal was not a decision on the merits. *Cf. Verser* v. *Ford*, 37 Ark. 27.

SALES — IMPLIED WARRANTY OF MERCHANTABILITY — LATENT DEFECTS. — The plaintiff was poisoned by beer which he bought from the defendant, a tavern-keeper, who in turn had bought it from a brewer. The poison which the beer contained, owing to defective brewing, could have been detected only by a skilful chemical test. *Held*, that under the Sale of Goods Act the defendant is liable on an implied warranty that the beer was fit to drink. *Holt* v. *Wrenn*, 19 T. L. R. 292 (Eng., C. A.). See NOTES, p. 590.

SALES — STATUTE OF FRAUDS — TRANSFER OF CHOSE IN ACTION. — The plaintiff declared on the breach of an oral contract by which the defendant had agreed to purchase a debt due the plaintiff from a third person. The defendant demurred on the ground that the contract was void as a sale of goods, wares, and merchandise within

the Statute of Frauds. Held, that the demurrer must be sustained. *French* v. *Schoonmaker*, 54 Atl. Rep. 225 (N. J., Sup. Ct.).

In England it is settled that a contract for the sale of a chose in action is not within § 17 of the Statute of Frauds. *Humble* v. *Mitchell*, 11 Ad. & E. 205. In this country, however, the statute is generally construed to include all securities which are commonly transferred in a tangible form; for example, bonds and shares of stock. *Greenwood* v. *Law*, 55 N. J. Law 168; *Tisdale* v. *Harris*, 37 Mass. 9. This view seems within the spirit of the statute, since the transfer of such securities is essentially the same as the transfer of ordinary goods and merchandise. But to ordinary choses in action the courts have generally refused to extend this rule. *Somerby* v. *Buntin*, 118 Mass. 279. Only one decision has been found which supports the principal case. *Walker* v. *Supple*, 54 Ga. 178; virtually overruled by *Rogers* v. *Burr*, 105 Ga. 432. An ordinary chose in action apparently is not within the words of the statute. For this reason several states have specifically included choses in action in their statutes of frauds. See WOOD, STAT. FRAUDS, § 283. In the absence of such express provision it is difficult to support the principal case.

SALES — TRANSFER OF TITLE — PRESUMPTION WHEN SOMETHING REMAINS TO BE DONE. — An action was brought for the price of certain wood which was to be measured by the buyer to ascertain the exact price. *Held*, that title has not passed. *Porter* v. *Bridgers*, 43 S. E. Rep. 551 (N. C.). See NOTES, p. 587.

TAXATION — EXEMPTIONS — PROPERTY OF CHARITABLE INSTITUTION USED FOR REVENUE. — A statute provides for the exemption from taxation of "buildings used exclusively for charitable purposes, with the land whereon the same are erected, and which may be necessary for the fair enjoyment thereof." *Held*, that lands held by a charitable institution as a part of its endowment, and not used directly in the institution's work, are not exempt. *Cooper Hospital* v. *City of Camden*, 54 Atl. 419 (N. J., C. A.), overruling *Cooper Hospital* v. *Burdsall*, 63 N. J. Law 85.

For a discussion of the principles involved, see 16 HARV. L. REV. 70.

TORTS — ABATEMENT — NEGLIGENCE OF SOLICITOR. — An action was brought by a former client against a solicitor for damage caused by the latter's negligence. The defendant died before trial. *Held*, that the cause of action survived. *Davies* v. *Hood*, 114 L. T. 313 (Eng., K. B.).

By the old common law, while contract actions survived if primarily concerning property, tort actions, including assumpsit, did not. See 1 SAUND. 216, note. But the tendency has constantly been to allow more actions to survive, through assumpsit becoming a contract action and through the extension of the scope of contracts implied in fact. See *Stimpson* v. *Sprague*, 6 Me. 470. Now the form of action is not generally considered as material; and hence if the action, though brought in tort, is one where there was also contractual liability, it will in general survive. *Lee's Admr.* v. *Hill*, 87 Va. 497. Modern statutes provide that tort actions for injuries to property shall survive either the defendant's or plaintiff's death. See *Miller* v. *Young*, 90 Hun (N. Y.) 132; *Cotter* v. *Plumer*, 72 Wis. 476. The principal case therefore accords with the modern cases decided under statute. *Tichenor* v. *Hayes*, 41 N. J. Law, 193. It would seem, however, that the result ought to be the same independently of statute, since assumpsit would lie here on an implied promise. *Varnum* v. *Martin*, 32 Mass. 440. There are, however, *dicta* to the contrary. See *Elder* v. *Bogardus*, Hill & Den. Supp. (N. Y.), 116, 119.

TORTS — LIBEL — PLEADINGS ABSOLUTELY PRIVILEGED. — The plaintiff's declaration stated that the defendant had in his pleadings in a previous action alleged falsely and with actual malice that the plaintiff, a stranger to the action, had voted illegally. The allegation was pertinent to the issue in that case. *Held*, that the allegation is absolutely privileged. Wilkes, J., dissented. *Crockett* v. *McLanahan*, 72 S. W. Rep. 950 (Tenn.).

The general rule is that statements in pleadings are absolutely privileged when pertinent to the issues. *Runge* v. *Franklin*, 72 Tex. 585; *Link* v. *Moore*, 84 Hun (N.Y.) 118. An exception to this rule has heretofore been recognized as existing in Tennessee, where it has been held that allegations with reference to one not a party to the action are only conditionally privileged. *Ruohs* v. *Backer*, 6 Heisk. (Tenn.) 395. No other jurisdiction appears to have adopted the distinction. See *Jones* v. *Brownlee*, 161 Mo. 258. Wilkes, J., dissenting, supports the former Tennessee rule on the theory that, since the parties control the framing of the issues, they can so shape the case as to libel anybody with impunity if there is no exception in favor of third parties. Judges

generally, however, have considered that, even though the privilege may at times be abused, yet public policy requires that judicial investigations should not be hampered by fears of groundless libel suits against those involved in the proceedings. On the whole the latter view seems preferable. Accordingly the principal case appears sound in bringing Tennessee into line with other jurisdictions.

TRUSTS — DISTINCTION BETWEEN PERSONAL AND REPRESENTATIVE CAPACITY OF TRUSTEE. — *Held*, that a judgment in a foreclosure suit against a party not described as a trustee does not prevent him from setting up in a subsequent action a claim as trustee to the property in question. *Farmers' Loan and Trust Co.* v. *Essex*, 71 Pac. Rep. 268 (Kan.).

In an action brought for the assessment of taxes upon lands owned by the defendant, she was described as "trustee of A. H." The land was in fact owned by the defendant in her own right. *Held*, that taxes may be assessed against the land in the present action, for the reason that the words "trustee of A. H." are merely descriptive, and consequently the defendant is present in her individual capacity. *Commonwealth* v. *Hamilton*, 72 S. W. Rep. 744 (Ky.). See NOTES, p. 588.

BOOKS AND PERIODICALS.

DISEASE OF DEFENDANT AS DEFENSE TO ACTION ON CONTRACT TO MARRY. — In a recent article some space is given to a discussion of venereal disease in defendant as a defense to an action for breach of promise to marry. *Venereal Disease in the Law of Marriage and Divorce*, by Charles Henry Huberich, 37 Am. L. Rev. 226 (March-April, 1903). The difficulties of the question are in part suggested, but no explanation is attempted. The writer does little more than cite extracts from one English and two American cases, which he seems to consider the entire law on the subject.

The author's discussion is involved in the broader question as to how far disease in general in a party to a contract of marriage will justify his refusal to perform. The possible cases would seem to fall into two general classes. In the first would come cases where the disease materially affects the health of defendant, the party refusing to perform, without making sexual intercourse dangerous to either party or impossible. In these cases there would seem to be no defense. Such a change in defendant's health may be imagined as would excuse plaintiff from performing, but, if the latter is willing, the defendant, it would seem, must perform or pay damages. In the second class would fall cases in which the disease would render intercourse dangerous to one party or impossible. In this class it will be convenient to make four subdivisions.

(*a*) The existence of such disease may be known to defendant at the time of contract, but he may have had reasonable ground to believe that it could easily be cured. In this case there would seem to be a valid defense provided the court would protect him were the disease unknown, as in subdivision (*d*). See *Allen* v. *Baker*, 86 N. C. 91.

(*b*) But there may be no reasonable ground for believing that the disease is temporary in its nature, and in this case, on the analogy of the cases in which a married man is held liable when he contracts to marry a single woman, there would seem to be no defense. *Cf. Kelley* v. *Riley*, 106 Mass. 339.

(*c*) Where such disease does not exist at the time of contract but its subsequent appearance is due to defendant's fault, there would seem to be no ground for a defense.

(*d*) But the disease may appear without any fault on defendant's part, and this is the form in which the question has generally been presented to the courts. The earliest case is *Hall* v. *Wright*, 1 E. B. & E. 746. There, after the contract, defendant became afflicted with a "bleeding at the lungs" making intercourse dangerous to him. It was held to be no defense. The Supreme